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April 14, 1998

HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: Reply Comments of Omnipoint Communications Inc.
CC Dkt. No. 96-115 and CC Dkt. No. 97-149

Dear Ms. Salas:

Enclosed please find an original and eleven (11) copies of the Reply Comments of Omnipoint Communications Inc. filed in the above-captioned matter.

If you have any questions, please feel free to contact me.

Sincerely,

James J. Halpert

JJH/spj
Enclosure

WASH01A:122829:1:04/13/98
22489-1

Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Implementation of the	)	CC Dkt. No. 96-115
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	
	)	
Implementation of the Non-Accounting	)	CC Dkt. No. 97-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, as Amended	)	

REPLY COMMENTS OF OMNIPOINT COMMUNICATIONS INC.

Omnipoint Communications Inc. ("Omnipoint"), by its attorneys, files these reply comments responding to the Commission's Further Notice of Proposed Rulemaking in its CPNI proceeding.[1]

I. FURTHER RESTRICTING USE OF CPNI WITHIN A CARRIER'S TOTAL SERVICE OFFERING IS INCOMPATIBLE WITH THE PLAIN LANGUAGE OF SECTION 222, AND DISSERVES PRIVACY, COMPETITION AND EFFICIENCY INTERESTS.

In its opening comments, Omnipoint explained that imposing an opt-out from all marketing uses of CPNI within a carrier's total service offering is incompatible with the plain language of Section 222, which authorizes, rather than limits, use of CPNI within

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[1] Second Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. 96-115 & 97-149 (rel. Feb. 26, 1998) (hereafter "the FNPRM").

the total service offering. See 47 U.S.C. § 222(c)(1). Subsection 222(c)(1) is the provision of the statute that addresses CPNI within the total service offering. It sets forth in specific terms the categories of individually identifiable CPNI that telecommunications carriers *may* make use of, disclose or permit access to without customer approval. 47 U.S.C. § 222(c)(1). While § 222(c)(1) limits these categories, it imposes no restrictions whatsoever on carrier use of the information falling with the defined range of CPNI.

Congress could easily have created an opt out provision in Section 222. Indeed, in the Telephone Consumer Protection Act, 47 U.S.C. § 227(c), it provided for precisely such a regime.[2] However, Section 222 and the legislative history contain no indication that Congress intended an opt out from a carrier's use of CPNI falling within scope of subsection 222(c)(1). Section 222 is the product of a delicate "balance b[etween] competitive and consumer privacy interests with respect to CPNI."[3] As discussed below, an opt out within the total service offering would have an adverse effect on competition. In light of the specific language of the statute and the careful balancing of interests that it reflects, the Commission should not create an opt-out requirement where the statute clearly does not provide for one. Any changes to the present statutory scheme must by initiated by Congress.

In its initial comments, Omnipoint also explained the unique obstacles such an opt out rule would create for integrated CMRS offerings that deliver telecommunications and information services through a single handset. The statutory exceptions of subsection

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[2] See 47 U.S.C. § 227(c)(1) (directing Commission to conduct a rulemaking to protect residential subscribers' "rights to avoid receiving telephone solicitations to which they object.").

[3] Rep. No. 104-458, Joint Explanatory Statement of the Committee of Conference [hereafter "Joint Explanatory Statement"], at 205.

222(d)(1) and (2) apply only to use of CPNI for billing, collecting, fraud prevention, and the like, *for a telecommunications service*. Consequently, under the plain language of subsection 222(d), imposing an opt out from all use of CPNI, including information service usage information that appears on a PCS telephone bill, would make it impossible for GSM carriers to use this information for billing, collecting and preventing unauthorized use of the integrated information service. Accordingly, Omnipoint emphasized that if the Commission decides to impose a total service opt-out it should make clear that: (1) customers may not opt out of use of data concerning their usage of PCS information services, which is an essential element of their total service offering, even if such data happens to appear on a telephone bill, and (2) such data may be used for all the purposes set forth in § 222(d).

In these reply comments, Omnipoint concurs with the overwhelming majority of commenters who provide more general observations regarding the negative consequences of a total service offering opt out rule.

First, as many commenters noted, an opt-out rule would in all likelihood disserve the privacy interest cited in the FNPRM. See id. at ¶ 205. By denying carriers the ability to market on the basis of information most probative of the services their customers desire, an opt-out rule would actually produce a greater volume of "cold call" marketing appeals to a broader audience, a result that hardly promotes privacy.[4]

Second, a total service opt out rule would disserve the consumer interest in finding the best service for the consumer's money, the very reason the Commission

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[4] See, e.g., Comments of MCI at 4; Comments of Bell Atlantic at 2; Comments of US West at 4.

adopted the total service approach.[5] This barrier to the efficient flow of market information would have a particularly negative effect on consumers of more rapidly evolving services, such as PCS. See Comments of Sprint PCS at 4. The prices and services in this new industry frequently change, and consumers benefit from learning about new service options provided by their PCS carrier. Indeed, an opt out rule would produce considerable customer confusion and frustration when customers who exercise an opt out right subsequently discover that they have not received notice from their carrier of improved service options available to other customers. See Comments of Bell Atlantic at 2.

An opt-out rule would likewise be detrimental to the other statutory interest underlying Section 222 -- promoting competition. See Joint Explanatory Statement, at 205. Omnipoint is particularly concerned that an opt out rule would place a disproportionate burden on smaller competitors by increasing the costs of marketing efforts in a way that would advantage larger competitors. See Comments of Vanguard Cellular Systems at 6-7.

Moreover, it is unnecessary to read an opt out rule into Section 222 because Congress has already provided for an opt out in the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(c) ("the TCPA"). The TCPA already provides ample protection for consumers from telemarketing efforts using CPNI, and consumers are already accustomed to, and likely welcome, receiving mailings from their existing carrier

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[5] See Second Report & Order, at ¶ 35 (total service approach "allows the carrier to suggest more beneficial ways of providing the service to which the customer presently subscribes"); see also, Comments of Intermedia at 5-6; Comments of AT&T at 6; Comments of Bell Atlantic at 3.

regarding new options within a carrier's total service offering. Accordingly, imposing an opt out for Section 222(c)(1) CPNI would serve little or no purpose.[6]

Finally, Omnipoint wishes to respond to a central assertion in the comments of the Georgia Consumers' Utility Counsel (GCUC), the only commenter to support the opt out proposal. The GCUC's contention that Section 222 does not mention an opt out "because it has always been assumed that customers have the right to refuse the use of CPNI for marketing purposes generally," Comments of GCUC at 4, cannot be reconciled with the Commission's treatment of CPNI before the 1996 Act. As the Second Report & Order notes, the Commission did not have any such across-the-board opt out rule to use of CPNI. Id. at ¶ 176. Instead, the Commission's rules applied "only to the BOCs, AT&T and GTE, and only in connection with their use of CPNI to market CPE and enhanced services." Id.

II. THE FBI'S REQUESTS TO IMPOSE ADDITIONAL RESTRICTIONS ON CPNI SHOULD BE REJECTED.

In its opening comments, Omnipoint urged the Commission to reject the FBI's requests to prohibit foreign storage of and access to domestic CPNI, and to mandate domestic storage of U.S.-based customer CPNI. Omnipoint observed that these requests are incompatible with the statutory scheme, are enormously overbroad, would create serious impediments to the provision of international and domestic GSM roaming service, and would set a highly negative precedent for the information economy.

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[6] Indeed, the TCPA's opt out requirement belies the assertion of the Georgia Consumers' Utility Counsel ("GCUC") that the 1996 Act "indicates Congress' intent to protect consumers from telemarketing abuses that are inevitable in the wake of 'deregulation.'" Comments of GCUC at 6.

Significantly, no commenter has filed in support of the FBI's proposal. Omnipoint is in strong agreement with Iridium regarding the incompatibility of the FBI's requests with global roaming arrangements. See Comments of Iridium at 7-9. As with Iridium's network, Omnipoint's GSM roaming technology requires transfer of a customer's CPNI to foreign carriers. Indeed, one of Omnipoint's competitive advantages is its ability to provide international roaming on international GSM networks. Omnipoint currently has signed 75 international roaming agreements covering 44 foreign countries.

Effectively preventing carriers from providing GSM roaming service to international countries would violate the spirit of both Section 222 and the 1996 Act generally, which seek to promote competition and innovation for the benefit of consumers. Such a restriction would also present an enormous set-back to the U.S. wireless industry's participation in the global economy. The wireless industry is currently moving towards worldwide standardization and interoperability of different technology standards, thereby allowing seamless roaming anywhere in the world on all wireless networks. Adopting the FBI proposal would leave U.S. carriers behind the rest of the world, preventing them from providing international roaming and creating obstacles to interoperability with foreign carriers.

Furthermore, as MCI observes, the FBI's proposed restrictions are equally incompatible with the operation of the Internet, which routes and stores information without regard to geographic boundaries. See Comments of MCI at 18. It would be wholly inappropriate for the Commission, absent a specific statutory requirement, to impose restrictions that would effectively prohibit key advantages of innovative services that carriers have gone to great expense to deploy and that are of great benefit to the public.

Section 222's requirements, including the requirement of customer approval prior to disclosure of CPNI to third parties, apply with full force to all carriers who provide

service in the U.S. Carriers cannot side-step these requirements by storing information abroad or by failing to maintain copies in the U.S.[7] Accordingly, Section 222 already addresses the FBI's essential concerns regarding unauthorized disclosure of CPNI.

Furthermore, with regard to the FBI's concern about obtaining access to CPNI from U.S. carriers, the information may be subpoenaed from the carrier regardless of where it is stored. Federal law provides for law enforcement subpoenas of CPNI from providers of interstate or international service,[8] and subpoenas may be served upon corporations doing business in the United States obliging them to produce documents stored abroad.[9]

Accordingly, the FBI's proposed CPNI restrictions are not only incompatible with the statutory framework of Section 222, but would also have negative policy consequences that are unnecessary in light of the protections afforded by the statute and access afforded under existing law.

Conclusion

Omnipoint urges that the Commission decline to impose an opt out for total service offering CPNI, or at least refrain from applying an opt-out rule to integrated PCS

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[7] See Comments of MCI at 19; Comments of Intermedia at 10-11; Comments of GTE at 8.

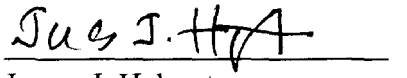
[8] See, e.g., 18 U.S.C. §§ 2703(c)(1)(C) & 2510(12) (providing for subpoenas of toll billing records, length of service and types of services utilized from any carrier whose service affects interstate or foreign commerce).

[9] See U.S. v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983); U.S. v. Vetco, Inc., 691 F.2d 1281 (9th Cir.), cert. denied, 454 U.S. 1098 (1981) (production of bank records); see also Doe v. United States, 487 U.S. 201 (1988) (court may order person in the United States to sign consent directive authorizing release of foreign records); .

total service offering CPNI. In addition, Omnipoint asks the Commission to reject the FBI's call to impose record storage, access and maintenance requirements on CPNI that are incompatible with Section 222, would seriously impede PCS international and roaming service, and are rendered unnecessary by the other provisions of Section 222 and access available under existing law.

Respectfully submitted,

OMNIPOINT COMMUNICATIONS INC.

By: 

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